MICHIGAN SUPREME COURT

PUBLIC HEARING
SEPTEMBER 15, 2004

JUDGE BORRERO: Before you start Chief Justice Corrigan and Justices of the Supreme Court, on behalf of the County of Saginaw I would like to welcome you to the county of Saginaw and it is indeed a privilege for me personally and for our community to welcome all seven of the Justices of the Michigan Supreme Court to our community. A couple of years ago you gave us the honor that you sought our community to do a retreat as you called it, and I think we met at that time and this is I think the second time that all the Justices, I see periodically one of you coming through here once in a while but when all the Justices are here I think it's the second time and it is indeed a privilege for our community to have all seven of you here. And if there is anything you need or anything you want I'm around and we're here to make sure your stay in our community is a very pleasant stay. And again, many thanks for selecting our community and having this public hearing here and if you need anything let me know and I know all of you and respect the fact that you've chosen our place to have this hearing. So with that thank you very much and I'll see you all at noon.

JUSTICE CORRIGAN: Thank you so much Chief Judge Borerro and we look forward to seeing you later this afternoon, so thanks very much. Welcome everyone to this public hearing of the Michigan Supreme Court here in Saginaw. This is one of our frequent public hearings that the Court holds in order to handle administrative matters on the Court's administrative docket. We would ask that each speaker this morning restrict yourself to 3 minutes and the Court may have questions for you that we would pose subsequent to that but we ask you to honor the 3-minute rule. So without further adieu let me call Item 1 on our administrative docket today.

ITEM 1: 2002-34, 2002-44 COURT OF APPEALS DELAY REDUCTION PROPOSAL

MR. GROSS: Thank you, Your Honor. Jim Gross. I haven't hesitated to come before you on prior occasions and deliver a Jeremiah ad when I saw something a little ill-advised, so I thought that fairness dictated that I come and endorse a reasonable proposal that I think shows some promise. The rest of the remarks are on behalf of myself and on behalf of Michigan Defense Trial Counsel whose board discussed the proposal. Judge Whitbeck and the Court of Appeals staff deserve credit and recognition for the work that they did before this proposal was put forth. I actually read the preliminary report of March 2000 and all three progress reports. Please don't quiz me, it's been several weeks. But understanding the efforts that the court made before asking the bar to do anything makes all of this a lot more palatable from this side of the bar. I only have three observations and recommendations to the proposal. First, the motions to remove must be given serious consideration by the screening staff. A summary disposition motion on a

slip and fall is simply not on the same order of complexity as a summary disposition involving 2 or 3 issues of governmental immunity. If application of the language of a specialized insurance policy, if the right cases are picked, the briefing limits are going to be tolerable. They may be a little bit short. Picking the wrong courses is what is going to exacerbate the page limit problems. Second, and I didn't originate this proposal. This is from Brian Shannon's letter but I thought the point ought to be made. When leave has been granted, when the case is there on leave granted allow the parties the option to rely on their application papers instead of going through another whole round of briefing. First of all the parties are going to be more satisfied that they made their presentation. Second it's a time saver. You're not going to have to wait for additional briefs to be filed. If you think it all the way through it's repetitious. It also, from the court side, allows a short second look at a case which might have been marginal for preemptory reversal but one or more of the judges was not quite that comfortable with it. So if you shift it on to the fast track and allow the parties to rely on their application papers, you're basically taking a second look at maybe disposing of the case more quickly than even if you kept it on the summary disposition fast track. The last suggestion is again not original, I saw that Brian and Ros Rokind made the suggestion, is allowing a 5-page reply brief within 14 days. And I'm not suggesting that the track be expanded to accommodate it. It's an optional brief, the parties can file it. They know the case is under consideration after the appellee brief so they better get it in quick.

JUSTICE CORRIGAN: Mr. Gross your time is up. Three minutes goes by fast. Are there any questions that the Justices have?

JUSTICE YOUNG: Yeah, could I ask, on the question of reliance on the lower court brief, I was just trying to remember, is it the briefing requirements that precludes a party from saying rather than submit a 20-page brief, I rely on the application filed? What technically in the rule precludes a party from saying rather than replicate my application in the form of a brief I rely on my application.

MR. GROSS: You mean in the proposed administrative order?

JUSTICE YOUNG: Anything that precludes a party.

MR. GROSS: There is nothing that precludes it but this is an experiment in the pilot project. Without some recognition of this being proper I would personally see the risk of doing that and having the court say that you can't. But there is nothing in the rule that precludes it.

JUSTICE YOUNG: Maybe Judge Talbot will speak to that because I wasn't aware that there was anything that precluded that.

MR. GROSS: I don't see anything that precludes it.

JUSTICE KELLY: Did you have a point to make that hasn't been made in writing?

MR. GROSS: Actually the only thing that I didn't blurt out was one more sentence on the reply brief and that was the reply brief also allows the appellant to respond to an alternative ground for affirmance. And this is a very common tactic. As an appellee you're always looking for those. Just that one other reason for making a provision for reply briefs.

JUSTICE CORRIGAN: Thank you Mr. Gross. Our next speaker is Victor Valenti, who is the chair of the appellate practice section.

MR. VALENTI: Good morning, Your Honors, pleased to be here. Victor Valenti on behalf of the appellate practice section. I want to thank the Court first off for the November 2003 order that resulted in the plan and the case management work force and this 90-90 plan. We also want to congratulate the Court of Appeals and Chief Judge Whitbeck is not here but Judge Talbot and Sandy Mangel on their continued progress in dealing with this deal reduction problem as set forth in the most recent July progress report. The section trusts that this Court will closely evaluate the delay reduction progress that has been made to date before adopting this 90-90 plan but realistically we assume that some kind of a plan will be adopted and just to discuss some of the things that we like--we do like specifically this proposed 2-year sunset provision. I would assure the Court that the sections has already developed and designated our court practice committee to work with the Court of Appeals on gathering and evaluating both objective and anecdotal information in the event that this plan is adopted so that we have something to keep reporting on how this is actually working. With respect to concerns Mr. Gross discussed, one of them the reply brief so I won't go back into that. I think that just about everybody who has commented in writing on it has discussed that so I echo that. In general the concern that the section continues to have is the fact that because such a high percentage of the cases that ultimately end up with this Court involve summary disposition rulings we simply want to make sure that there continues to be due deliberation in cases that end up in this so-called fast track. I think the only other specific refinement that I would propose and in discussing this and reviewing the letters, it seems to me as though it makes no sense and it seems to the section that it makes no or little sense to limit the briefing to 20 pages. We would suggest that the Court give some consideration to allowing 35 or the same 50-page brief. That would seem to have negligible impact on delay reduction--

JUSTICE CORRIGAN: Just a question for you Mr. Valenti. Do you understand why the work group focused on 20 pages. Do you have what their rationale was for that number?

MR. VALENTI: I suppose that I can speculate but I'm not sure that I have specific information. That's something that you would have to ask the work group about.

JUSTICE CORRIGAN: Okay. Your time has expired. I don't know if any Justices have questions.

JUSTICE KELLY: So it's with respect to the time period, now what is your recommendation?

MR. VALENTI: With respect to time period the only change we would propose with respect to the time period, and it doesn't affect the big picture of the so-called plan of deciding cases within 180 days, is simply allow the filing of reply briefs up to five pages long within 14 days, and as Mr. Gross indicated, that's never been something that causes any scheduling problems because it is, in theory at least, an optional brief. I know there are cases where I sometimes don't file reply briefs in regular cases. And then I think that's it with respect to any real timing concerns, Justice Kelly. The only other thing as I say the proposal for the two-year, I called it a sunset period, evaluation period on the plan is something that we specifically do appreciate.

JUSTICE CORRIGAN: Thank you for coming Mr. Valenti.

MR. VALENTI: Thank you.

JUSTICE CORRIGAN: Scott Brinkmeyer, president of the State Bar.

MR. BRINKMEYER: Good morning Madam Chief Justice and Justices of the Supreme Court. For the record my name is Scott Brinkmeyer. I'm president of the State Bar of Michigan and I am appearing today on their behalf. I am here to speak in support of this proposal. I want first to express my appreciation on behalf of the bar for your appointment of a number of my esteemed colleagues of the appellate bar to the workgroup that helped to develop this proposal. They appreciate that opportunity. There are two things that I think are critical in considering this and understanding that, as you've probably gleaned from the comments, this was a compromise. There are very credible concerns that members of that workgroup, the practitioners have, many of which have been expressed to you in writing and will be expressed today. But nonetheless it was submitted as a unified proposal. The bar supports it with the two caveats; that one, the sunset provision remain; that this two-year pilot project does have the continuing and careful assessment of the data as it comes in so that at the end of that period qualified personnel hopefully, the members of that workgroup, will have another opportunity to come back to you after having assessed that appropriately and make any additional recommendations they may have as to how this could be appropriately tweaked or changed if necessary so that we end up with the best program that we possibly can have. We appreciate that any wasted time in the appellate system results in the denigration of

the justice system to the practitioners, to the court, and most importantly to our clients and it is after all for the benefit of the public that these processes are put in place anyway. And we hope that through this process of continued review we'll have the ability to assure that their rights and their access to this system is protected. Thank you.

JUSTICE CORRIGAN: Thank you Mr. Brinkmeyer. Any questions Justices? Thank you for coming this morning. And finally on Item 1 Judge Michael Talbot of the Court of Appeals.

JUSTICE WEAVER: Excuse me. Can I ask one thing of Mr. Brinkmeyer. I thought he said he had two concerns.

JUSTICE CORRIGAN: Mr. Brinkmeyer will you come back please?

JUSTICE WEAVER: Did you have two concerns? I had sunset provision. What's the other one. I missed it.

MR. BRINKMEYER: Continued review.

JUSTICE WEAVER: Continued review. All part of the same. Okay. Even if it doesn't sunset.

MR. BRINKMEYER: Well yes. We would hope that it would but that there would be an opportunity for that workgroup to come back before this would be made permanent and to give you further recommendations based upon the assessment of the data that is collected in the meantime.

JUSTICE WEAVER: All right. Thank you.

JUSTICE YOUNG: Let me ask--I did notice that although there is a sunset there is no evaluation process ongoing interim. It is your position that there should be some formal ongoing self-evaluation process?

MR. BRINKMEYER: What I would hope at a minimum would be that the workgroup that was put together by the Chief Justice would continue and that that workgroup which already has the background information on the formulation of this would be in the position over the next couple of years to evaluate that data that comes into the Court of Appeals along with Chief Judge Whitbeck and the Court of Appeals and to come back to you at the end of that period with whatever recommendations they may have.

JUSTICE YOUNG: It will be interesting to see what Judge Talbot has to say.

JUSTICE WEAVER: So it is your understanding of this that the sunset provision to you means that if we don't act again on it it would stop.

MR. BRINKMEYER: That would be my understanding.

JUSTICE WEAVER: And that your desire is to have the workgroup during this two-year period make evaluations and then make a recommendation to us that we would have to take formal action to continue it or it would all end. Is that your understanding of it?

MR. BRINKMEYER: Yes.

JUSTICE WEAVER: And that's your desire?

MR. BRINKMEYER: Yes, Your Honor.

JUSTICE CORRIGAN: Thank you Mr. Brinkmeyer. Judge Talbot.

JUDGE TALBOT: Good morning. I want to apologize for Chief Judge Whitbeck not being able to be here. He's about 125 miles away. He had a commitment this morning and he just could not be here. But he asked me I think on three different occasions to apologize for his absence here.

JUSTICE CORRIGAN: Would you just formally identify yourself?

JUDGE TALBOT: All right. I'm Judge Michael Talbot of the Court of Appeals. I served on the workgroup along with Justice Young and some of our staff and members of the bar. I was thinking--I hadn't planned on this but I want to respond to that one question because I'm thinking too--I'm asking you to be a little flexible. It may be during a period of two years we identify a problem. We're going to. We're going to see things that don't quite pan out and so I would like to be able to have a mechanism where we simply will submit a suggested change through the workgroup and that we get kind of a quick turnaround on changes. Now I'm jumping way over to something here but I hadn't thought a lot about that but I don't want to be married to something for two years that might not be a great idea.

JUSTICE YOUNG: Well if I may, do you accept in concept the notion that that workgroup or some successor to it will continue to exist and help evaluate from the practitioner side and of course from the court's perspective how various of these provisions are working.

JUDGE TALBOT: I do indeed and that was part of the point I wanted to try to really emphasize this morning and that is some of our previous efforts did not have bar participation. Even if they might have been a good idea because of the absence of bar participation I think it resulted in some tension. By having the bar actively participate and having members of the bar who do this work for a living sign on without exception I think says that this is a plan that the members of the bar can live with, as can the court. Are there areas where changes would possibly be made. If Justice Young and I sitting on that committee tomorrow, we re-met and we said how about if we tweak this because we weren't real happy the first go-around, or how about if we do that to it, yes we could do that and that's kind of what worries me though. Let's get this started. It has the sign-on of all of the workgroup. If we identify a legitimate problem and there will be something as we go along, we want the group to continue to review whether we meet on a quarterly--we haven't really talked about it but we could--meet on a quarterly basis, look at some problems and bring them to you and I hope for kind of a quick turnaround and some adjustments to the administrative order. But I would venture to guess and I don't mean to put him on the spot but if I asked the previous speakers could each of you live with what is here now I think the answer is yes.

JUSTICE CORRIGAN: Could we ask you some questions about suggested tweaks that have been the product of public comments. So do you, on behalf of the workgroup and the court, object to the 5-page reply brief that has been suggested?

JUDGE TALBOT: 9(D) allows for a reply brief. It simply says it shall be by motion. So it doesn't preclude reply brief so I don't want anybody to think that we suddenly said this is so different that we don't allow reply briefs. But we're simply saying that we file a motion.

JUSTICE WEAVER: Isn't that going to bring a lot of unnecessary motions to have a reply brief and then you have to look at it again--look at the brief--whether you grant it or you don't grant it. Why not just give them the 5 --

JUDGE TALBOT: Experience dictates that it causes--remember now we're trying to move these things along as best we can and we're simply asking the practitioner instead of just pro forma filing a reply brief, it's usually the defendant below, appellee above, usually, feeling well I better do it, my client would expect it, that kind of a thing. Instead of just a pro forma reply which doesn't have a lot of meat into it other than to say we said this already, we're asking them to take a loot at it, how serious are you, file a motion with it.

JUSTICE WEAVER: Well isn't that going to be a pro forma motion to be able to do it so you're not subject to malpractice.

JUDGE TALBOT: I don't think so.

JUSTICE WEAVER: Why is it any different.

JUDGE TALBOT: Because they're going to have to file a motion and pay a fee.

JUSTICE WEAVER: I know but they could file a reply brief and be done with it.

JUDGE TALBOT: And pay a fee.

JUSTICE WEAVER: Ah, it's a fee.

JUDGE TALBOT: They will have to do both.

JUSTICE WEAVER: Ah, so it's another fee. With a motion it's a fee whereas if they filed the brief and not have a fee.

JUDGE TALBOT: It will cause them to think about it. That's what I believe will happen.

JUSTICE WEAVER: What's the fee.

JUDGE TALBOT: I have no idea what the fees are.

JUSTICE WEAVER: What do you all charge for a motion fee right now?

JUDGE TALBOT: I don't know.

(Someone in audience): $75.00.

JUSTICE WEAVER: So it would be another $75. Thanks.

JUSTICE KELLY: Given the requests that we've heard from Mr. Valenti and Mr. Brinkmeyer and Mr. Gross, could we turn this around and say would those changes be something that you people could live with, those of you who crafted this?

JUDGE TALBOT: Well which ones. For example, motion to remove--

JUSTICE KELLY: Is there any you couldn't live with, Judge Talbot?

JUDGE TALBOT: Motion to remove to give serious consideration. That was one recommendation. Of course it will be given serious consideration. As a matter of

fact we have already talked about the fact that you can remove at any given time. We've got a number of mechanisms in there for the removal, the first of which is on motion. And that would be reviewed early on by our administrative judges in the four districts. And we've also decided that we're going to meet on a probably monthly basis, videoconference together the four judges saying how many have we had, what's the nature of them. What standards have we used, how many have you granted or denied--so we want to have a consistency throughout the state. So we've already anticipated we'd like some quality review on that. And plus ultimately when it gets to a panel the panel can say we want to remove because the panel thinks it is of significance. The panel has to keep it just as our internal rules now say that on a summary judgment if you think that this thing should have oral argument or something of that nature you keep the case. You don't get to send it back. That's one suggestion--

JUSTICE KELLY: Anything you couldn't live with?

JUSTICE CORRIGAN: What if we doubled the pages that are permitted. Is that crucial--

JUDGE TALBOT: The point of this of course is this is de novo review from the lower court. One of the things we did was we required, which is not there now, the actual briefs from below. Oddly enough that is not there now. We do call for the lower court record but frequently that doesn't find its way to the record. We can, and it does happen sometimes, say please send us, and we affirmatively ask for it if you're a given panel, please send us the briefs from below. This requires the briefs from below and therefore it is a de novo review incorporating the product from below so you've got that product which will be looked at to make sure there isn't an expansion of record and you have the issues first developed, and so now you're having an additional 35 pages of material--

JUSTICE CORRIGAN: No, 20. But if it went to 35 as some have proposed--

JUDGE TALBOT: Remember that the practitioners, some have proposed, couple lawyers, but other lawyers who do this work for a living could live with it. So let's start with it, see if it becomes a problem. You can also, by provision, ask for permission just like you can for anything now, for opportunity to file more. Plus you've got appendices so opportunity to make your point is there. And remember again this is a summary disposition. We're talking usually one, two issues. The law or facts.

JUSTICE YOUNG: Is there anything in the rule that prevents somebody from relying on their application?

JUDGE TALBOT: The answer to that one is absolutely not. What we would simply say, however, on that one, and we looked at it, nothing prevents a party from copying the application with a new cover page. You just copy it, put a new cover page on it. But the apps go to a different panel than the briefs so we still need 5 copies to be filed--so we want to put the responsibility with the practitioners because we don't want to put the burden with Sandy's office, with the clerk's office. But there is nothing that prohibits that whatsoever. And as a matter of fact on the leaves, remember too we also get a commissioner's report so we have an analysis that has been done. We anticipate the leave cases--we could do something very quickly with them if they choose if they give us a good quality app plus the commissioner's report we could turn that around rather quickly.

JUSTICE CORRIGAN: I have one other question regarding if some form of this proposal is adopted you have recommended a start date of November 1. That is very fast in order to educate the bar at large and there will be malpractice consequences, will there not, if someone screws up. What are you doing to educate people in a six-week or one-month period and is November 1st really a realistic start date for this proposal.

JUDGE TALBOT: I was looking at my file. The group was actually created last November. The report was done February 17 was submitted to the Court and was put out on website and so those who do this on a regular basis for a living have known about this--

JUSTICE CORRIGAN: That's 600 lawyers. That is not the whole bar that comes to the Michigan Court of Appeals and practices. What about the folks who are not in the loop so-to-speak of the appellate practice section and the website and all the rest.

JUDGE TALBOT: Well the sooner we get approval, in other words if we get approval tomorrow on this thing, not only does it go on website but our lead time, we're giving a lead time of about a month and a half. It's a legitimate question as to how many way can we then communicate to the general bar--

JUSTICE CORRIGAN: How many ways can you educate the bar?

JUDGE TALBOT: But we don't get a lot of general bar--I don't know how you penetrate 36,000 lawyers most of whom never do anything on appellate.

JUSTICE CORRIGAN: But is it not true, my recollection from being on the Court of Appeals was that a lot of your customers are one time only practitioners who come there. And that there's a difficulty in educating that particular group as opposed to the regular practitioners from the appellate practice section.

JUDGE TALBOT: Sandy Menger may have already thought through how we're going to do that. We've got our website and it assumes that they even know that we have a website.

JUSTICE KELLY: But it's a big step forward I think.

JUSTICE WEAVER: Suppose you had a January 1 date. Would that really pose you problems.

JUDGE TALBOT: What would I tell them between November and January 1? It's the mechanisms of telling more important than the time period.

JUSTICE WEAVER: Well it's the mechanisms of finding out. It's not so much your telling, it's giving people a chance to find out. Would January 1 be a problem to you?

JUDGE TALBOT: I don't care. It's regrettable but--

JUSTICE YOUNG: Can I ask a question?

JUDGE TALBOT: Sandy can answer some suggestions on communication.

JUSTICE YOUNG: Do you have something?

MS. MENGER: I'm Sandra Menger, I'm the clerk of the Court of Appeals. We have been meeting about this over the summer and we have a variety of plans in place that we've been trying to implement with our programming in a test system. One of the things that we would do as each case comes through the door is we would immediately generate a postcard to all the parties on the case which would advise that we consider this to be a case that falls within the administrative order or the rule, however that works out, and would contain a link or an address for a place on the website to go to see the administrative order, to see other introductory documentation that we'll have there for them. At that point they will be on alert that we consider this case to be on the fast track and that if they have filed, for instance, a motion to remove, we're aware of it and it will be handled under the timeline that is in the administrative order or the court rule, and they'll have an order within the amount of time that we're required to do the ruling. We will be working--

JUSTICE CORRIGAN: Does the timing on the postcard meet the time constraints of the plan?

MS. MENGER: Yes. We're set up to be moving these around inside the court so that we can meet all of the timelines that we put in our proposal, and the postcard would go out within the first 24-48 hours that the case was in our facility so that as soon as it is identified as involving a summary disposition and not having anything else that would exclude it, that postcard will go out.

JUSTICE CORRIGAN: Just out of curiosity, what portion of your docket are summary disposition appeals?

MS. MENGER: When we ran the statistics last year when we were working on this workgroup, it's about 50% of our civil docket.

JUDGE TALBOT: If we adopt this, under our current goals of getting to the 18 months (inaudible) percent, the Legislature gave us 5 lawyers additional and we are slicing away 15-20 days a month on that. This we believe within a timeline of about a year will get us another 70 days off. So it's a huge, huge impact.

JUSTICE CORRIGAN: Any other questions, Justices? Thank you Judge Talbot. We have no speakers on our second item.

ITEM 3: 200-32 APPELLATE ASSIGNED COUNSEL SYSTEM

JUSTICE CORRIGAN: The first speaker is Thomas M. Harp from MAACS.

MR. HARP: Good morning Madam Chief Justice, Justices. I am Thomas Harp. I am the administrator of the Michigan Appellate Assigned Counsel System and have been since February 1 of this year, and I was previously the deputy administrator for a couple of years prior to that. I come here thanking you for the opportunity to give a MAACS perspective. I know that Your Honors have received a letter from the Appellate Defender Commission dated September 9 and I would ask that you would carefully consider their proposals and comments regarding their proposed standards. I agree with them. I would ask you to blame me for typographical errors that I observed in re-reading them yesterday. While I did not create this document, I am somewhat responsible for what you see before you and I apologize for those errors. I'm also incredibly grateful that we're talking about minimum standards. MAACS uses these standards as the preamble notes in the general way of trying to create an effective if not excellent representational norm for appellate assigned representation. And specifically I use them a lot. My office uses these standards in order to generally evaluate the performance of MAACS roster attorneys and we do a re-application process now in which that re-evaluation occurs regularly. But I also use them to specifically analyze and make determinations about complaints that I receive from defendants about the quality of the representation that is being afforded them in an individual case. Consequently the whole idea of minimum

standards has a very direct and specific impact on my office. With respect to specific standards I would like to speak at least briefly and not repeat the comments of the appellate defender commissioner regarding Standard 4. I personally on behalf of MAACS support Alternative A. Alternative A basically outlines the practice that the roster has been familiar with for a great many years, from the inception of the minimum standards. The provision of clerical assistance and procedural advice has always been there. I think the 84-day deadline with respect to filing in pro per briefs is certainly reasonable and I understand the need for that given delay reduction concerns and given numerous conversations I've had with Chief Clerk Menger about that particular need. The commission made additional points with which I agree but I won't belabor those points; they're in that letter. With respect to Standard 6 I would ask also, as did the commission, that you consider the original proposal from the Appellate Defender Commission. That basic proposal would--basically I'm somewhat uncomfortable as a matter of practice from having that standard assume that in all cases oral argument is appropriate from the beginning of the appellate assignment. I believe it is hortatory if you will to set a bar higher for the roster attorneys to actually consider in all cases in which they are assigned the need to carefully consider and make an assumption that oral arguments will be necessary and to timely file briefs on appeal within the constraints of that assumption. I believe, perhaps unintentionally, that the court's proposal, because it allows an individual lawyer to decide in advance if you will, from meeting those particular kind of time deadlines that Your Honor this case is inappropriate for oral argument. I have very real needs with respect to setting that bar.

JUSTICE CORRIGAN: Mr. Harp, I just want you to know that your time is expired so make your point, sir.

MR. HARP: If a defendant complains to me that oral arguments were waived and that was inappropriate, I believe that--because I do not have the benefit of the transcripts in making that kind of determination--I'm going to hear from a roster lawyer the case just wasn't appropriate for that. I don't know at what point that determination was made and I have a very difficult time deciding whether or not this standard as it is written by Your Honors would in fact have been met.

JUSTICE CORRIGAN: May I understand that when you're having a complaint you're saying you don't have the transcripts, do you mean you don't have the briefs?

MR. HARP: No. I have the briefs. I just do not have the--

JUSTICE CORRIGAN: What transcript would you get? Oh, you mean the trial transcript?

MR. HARP: Yes. The transcript upon which the lawyer had made the determination that oral argument was not appropriate in this case. I can go get it from the Hall but I'm out of the office, I'm over at your place of business and I'm away from doing what it is that I need to do and I'm reading a box in order to make that determination in response to a lawyer telling me, cavalierly perhaps, it just wasn't appropriate to conduct oral argument in this case. If I continue to have that bar no, file oral argument. Make sure your brief is filed in order to preserve oral argument. At least I start with that standard.

JUSTICE YOUNG: What you're saying, however, is you do not expect lawyers to exercise professional judgment.

MR. HARP: No, I am not, Justice Young.

JUSTICE YOUNG: Therefore you need a bureaucratic marker so that they can exercise the discretion that we expect of professionals. Isn't that exactly what you're saying?

MR. HARP: No sir. What I am saying, and with all due respect, what I am saying is that the encouragement that the proposal from the Appellate Defender Commission gives to the exercise of that judgment does a number of things. First of all it helps remind counsel that they ought to make that professional judgment with respect to things that are not necessarily outside the evaluation of that case. Professional judgments are made on a great many bases and as a result I would at least hope that the standard would--I believe the standard should set a high bar. I believe that that's necessary because this is extremely important work.

JUSTICE YOUNG: Well as it currently reads it should, in an appropriate case, request oral argument. Why is that not a high bar? What you really want is the elimination of the discretion, right?

MR. HARP: No sir. What I'm talking about is a shifting emphasis of the language to remind counsel on behalf of indigent accused that oral argument continues to be a valuable part of the appellate process and should be sought at least initially, the assumption should be that it should be necessary in every single case and then to do that professional evaluation and exercise that judgment on the basis of that assumption rather than later determining--because if they don't make that determination within the first 56 days then we're starting to get into problems that have to do with volume of cases that a roster lawyer may be doing and other kinds of impacts that do color that professional judgment.

JUSTICE CORRIGAN: All right, thank you Mr. Harp for appearing this morning. Patrick Ehlmann.

MR. EHLMANN: Patrick Ehlmann. I'm a private counsel who I think I've represented probably 500 criminal defendants on appeal over the years. And I want to address just a few of the standards. I want to support Mr. Harp's claim that preserving oral argument is very important and it's not simple. The important thing is that attorneys act timely. That they do their work in a timely fashion. The only thing that ties this together, the real reason to do that is to preserve oral argument. Having the oral argument is much less important than doing your work in a timely fashion and to de-emphasize, I think this de-emphasizes the importance of doing the work in a timely fashion. If you don't do your work in a timely fashion you miss valuable opportunities. I would much rather see the Court of Appeals act as the gatekeeper for which cases warrant oral argument than see the individual attorney do it not because I think they do a better job but because I think it is incumbent on attorneys to do their job in a timely fashion and I think when we're looking at minimum standards we're not necessarily concerned about the conscientious attorney exercising sound professional judgment. I think you have to be concerned certainly with the history of attorneys who have done this type of work that this is a problem and I think it needs to be--

JUSTICE CORRIGAN: Mr. Ehlmann, I thought from the way the roster is operating today that there is a group of highly trained and reliable lawyers who are on the MAACS roster now so that the concerns, while they may have been true a long time ago, there is a smaller crew of lawyers and we don't have that worry with them. Is that true or false to your knowledge.

MR. EHLMANN: I think both there is certainly a group, I don't think it includes every single person, and I think we've certainly seen over the years that as attorneys get older that sometimes there is a change that is not apparent to everyone initially but one of the first signs of that change is not doing things on time. And I think it's important before it becomes a big mess that is a substantial cost to the counties that are paying for these services that this be identified fairly early and it would be nice if you could have a qualitative analysis that would tell you this but you're not always going to get that and if you can look at one thing and say gee this attorney is not preserving oral argument in any of his cases, that I think is a clear single that something is going to be going wrong.

JUSTICE CORRIGAN: Wouldn't that be something that MAACS should be looking at in any event. In other words, when they're looking at the certification they ought to be look at does this lawyer file on time or not?

MR. EHLMANN: Absolutely, Your Honor, but again if the certification process is every few years one year of an attorney missing every single deadline and ending up with substitute attorneys having to be appointed I think is just a major disaster, certainly for the clients. Your Honors, I don't agree with Mr. Harp on the Standard 4, that I think it should require the attorney to provide procedural advice. Clerical assistance, I

don't agree because it imposes a gatekeeper--a client asks for clerical assistance in preparing the brief. The brief is not compliant with the court rules or worse, the brief misstates the law or the facts that are relevant to the case. All of a sudden you put the attorney, with an 84-day deadline, who is probably getting this within 7 days of that deadline, the attorney in the position of saying I'm not going to provide clerical assistance, this doesn't comply. I think that's a role that the Court of Appeals should play. It's just a very, very difficult position to put the attorney in and it means that the attorney is either going to have to do something that you feel is kind of unethical, that is, help in the preparation of false presentation to a court, or miss the deadline. I think it's not going to keep any valid claims from being presented if the attorney does not have to provide clerical assistance.

JUSTICE CORRIGAN: All right, we understand your point Mr. Ehlmann and thank you for appearing this morning.

MR. EHLMANN: Thank you, Your Honors.

JUSTICE CORRIGAN: Is Robert Tomak here?

MR. TOMAK: Good morning Justices. I am Robert Tomak. I'm a first level roster attorney and I don't know if I'm consistent with MAACS but I don't think you should adopt Standard 2. I believe that a personal conference with the client is important for all of the reasons in the Mukoff case. The observation by SADO in their letter--let me just back up. I think one of the consequences of this is going to be that the counties will use this language to possibly deny payment for visits unless it is specifically required by the standards. The SADO letter makes the observation that the counties will have to pay if the lawyer decides he's going to visit the client and cites the Mukoff case, but the Mukoff case obviously cites the previous standard that says except in extraordinary circumstances there has to be a personal visit. I heartily believe that things are missed in a telephone call or a video conference or any other electronic means. There just is no substitute for a personal conference with the client and I think Standard 2 should remain as it is.

JUSTICE KELLY: What if we put something in saying, for example, that a personal conference with a client is highly desired or preferable to another kind of means of communicating. Would that do the job?

MR. TOMAK: I think that's in--isn't it in the proposed--again I think it should be a requirement. I think that this language--Mukoff won't be authority any more because it's based on the prior rule. So I think you'll see the counties making judgments as to whether or not maybe a client should be visited and deny payment in some cases unless the attorney can give a detailed reason why he should go there.

JUSTICE YOUNG: Says at counsel's discretion not the county's.

MR. TOMAK: Counsel's discretion to visit the client, the county's discretion to determine the plan for payment of assigned counsel. And I think ultimately I think it's like a slippery slope kind of a thing and if they're not going to be paid they're not going to go, they're not going to go to the U.P. on their own time.

JUSTICE YOUNG: I have always been ambivalent about Standard 4 which implicates the lawyer who has already determined that issues that his client wants to raise are not suitable for whatever reason in counsel's brief to the Court of Appeals to become enmeshed in the filing of a brief. And as Mr. Ehlmann suggested that creates quite a bit of torsion it seems to me if you are obligated by this rule to provide clerical assistance for a brief that you don't believe should be filed in the first place and which may very well be making representations that are fraudulent.

MR. TOMAK: Right. I didn't have any strong feelings about that but--

JUSTICE YOUNG: Well let me ask you as a practicing attorney about that conflict.

MR. TOMAK: Well I don't like to say it but I kind of agree with the assistant from the prosecutor's office as to that standard. I believe it's creating rights that aren't in the court rules or statute--

JUSTICE YOUNG: Well we create rights all over--that's what these standards are. They're increasing the professional obligations of--

MR. TOMAK: No. I thought it would be increasing the defendant's rights in regards to his representation. As the --

JUSTICE YOUNG: You mean because he already has representation?

MR. TOMAK: Constitutional rights that the assistant was referring to. He calls it hybrid representation. I would kind of agree with what he's saying there.

JUSTICE YOUNG: This has been the standard so far. If we are going to pursue that standard do you think this is a substantial concern that we are imposing not only a new or an increased non-constitutional obligation on the attorney, but on the very attorney who has determined that the issues the client wants to raise are appropriate.

MR. TOMAK: Yeah I think it's a problem. That's going to create a problem in my personal view.

JUSTICE CORRIGAN: Thank you Mr. Tomak. That completes the speakers that we have signed up today and we appreciate all of you attending our hearing this morning. This Court is adjourned.